No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EASTERN OREGON LAND COMPANY, a corporation,

Appellant,

vs.

DESCHUTES RAILROAD COMPANY, a corporation,

Appellee.

DESCHUTES RAILROAD COMPANY, a corporation,

Appellant,

vs.

EASTERN OREGON LAND COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

VEAZIE, McCOURT & VEAZIE,
CHARLES S. WHEELER and
JOHN F. BOWIE,

Solicitors for Appellant.

JOHN F. BOWIE,
Counsel.

Filed this —— day of November, 1916.

F. D. MONCKTON, Clerk,

By.....Deputy.

GLASS & PRUDHOMME CO., PORTLAND, OREGON 128911

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We believe the court is more concerned with the facts and the real merits of the controversy, than it is with consideration of claims that inconsistent theories have been advanced in the pleadings. When the suit was filed, there was no railroad on the land—nothing but a grade, without ties, rails or bridges. (Brandon's Testimony, p. 423.) The relief asked was an injunction. In connection with the preliminary hearing, the fact came to light that plaintiff's predecessors in inter-

est had had certain dealings with the railroad company, from which a license to go on and construct the road was asserted. These predecessors of the plaintiff had specified on their part, that the defendant company should provide for and protect the hydraulic possibilities of the site—in other words, should not constitute itself an obstacle to the development of the power project. To this proposal the railroad company appeared to have agreed, to the extent of promising to provide for the construction of a 60-foot dam. The court denied the preliminary injunction and held the case for such relief as might appear proper on the final hearing.

We shall refer later in some detail to the evidence which goes to establish beyond question that the railroad company did enter on the land under just such an understanding with plaintiff's predecessors. This point is fully developed in our opening brief. What we wish to have carefully noted now is, that the decree as entered below *gives plaintiff no right to build a dam of any specified height whatever on its land,* but leaves the plaintiff at the mercy of the railroad company, which is here in court contending that the plaintiff, at any rate as against it, has no right to build a dam in excess of 28 feet, and, even then, must build at the peril of causing injury to the fills and embankments constituting a part of the roadbed of the railroad and of being held responsible therefor, *with no obligation imposed on the railroad company to protect its own works in case any dam is built.* This, we say, is an intolerable condition, whereby one of the most valuable water powers in the Pacific Northwest is rendered practically worthless.

TERMS OF THE DECREE BELOW.

If the court will kindly turn to page 126 of the abstract and note the decree that was entered below, it will be found that all rights granted to the plaintiff to erect a dam and maintain hydraulic works, are conditioned that the plaintiff must not flood *or damage* the track *or roadbed* of the defendant; and on page 129 the decree provides that the defendant is granted the right to maintain its railroad over the lands described and as now located, "*together with necessary cuts, slopes and safe supports therefor,* and the right to maintain and operate its trains thereover without interference on the part of plaintiff * * * in any manner whatsoever, except as permitted by this degree."

It may be possible that a dam approximating 60 feet in height could be built and maintained without flooding defendant's *track;* but its *roadbed,* which we may not flood, including its slopes and fills, which we are enjoined from interfering with or damaging, extend down far below the flood line of a 60-foot dam; and they are *admittedly liable to damage* by the construction of any such a dam.

PERIL TO ROADBED.

We desire to call attention to some of the testimony bearing on that point; the page references being to the pages of the printed transcript.

Mr. Kyle, one of the most experienced railroad engineers of the country, who built the North Bank Road

and is very familiar with the situation on the river, testifies (p. 295):

> "I have examined the roadbed of the Deschutes Railroad Company at and above the dam site. I would not think that it would be safe to construct a dam at that point 60 feet in height with the railroad constructed as it is, unless we used a great deal of rip-rap on the present banks, at least. If you put in plenty of rip-rap there, I think the danger would be slight. Of course, it might cave out in a few places where the rocks are of volcanic ash—in fact, it is nearly all volcanic ash for a short distance, but that could be rip-rapped, I suppose, and made perfectly safe. Volcanic ash is very light and very easily disintegrated when flooded. Water, I should say, would have a tendency to make it flow—make it flow very easily, move out of place."

Being recalled later, on cross-examination, Mr. Kyle testified (p. 494) as follows:

> "Q. Mr. Kyle, if the problem were presented to you to go up there and construct a dam 60 feet high, so as to maintain that water at the elevation and take care of the flood waters, with the lines as they are today, would you consider it an insurmountable problem?
>
> A. Well, I wouldn't want—I don't believe I would want to take the chances of building a dam there, if I had to stand the damages.

> You might construct a plant there that would operate and again you might have a lot of additional expense; that is, damages and so on. When a person actually has to take his chance, sometimes he will, but I don't think it is right to make a person take that chance when it is not absolutely necessary."

It appears from the testimony of Mr. Thompson (p. 243), that at the dam site the roadbed is a fill, the outer edge of which is built upon an old wagon road which was built up with a pile of rocks and bound together with sagebrush; that above the dam, the roadbed is in some places in open cuts; some places in through cuts, and some places built up of fills on rocky bluffs; that the ground consists of volcanic ash; that in places along the roadway, the grade is built on top of light volcanic ash.

Mr. Thompson's testimony continues (p. 244), as follows:

> "If a dam sixty feet in height were constructed at any of the dam sites under consideration above the falls in the river, the roadbed would be overflowed at times of high water, that is, basing on the maximum of 30,000 feet discharge. In my opinion as an engineer, after having inspected that roadbed, I would consider that if a sixty-foot dam should be constructed there, certain portions of the roadbed would be in hazard at all times. On other parts of the track, the grade might stay in.

> The effect of the inundation of those tracks and the rising and subsiding of the waters over them would be that in many cases the tracks or grades would slough out into the pond with the rise and fall of the pond. If the river should rise to a stage of 60,000 second feet, a good deal of track would be washed out and all of it would be submerged."

Mr. Dillman testifies (p. 277) that the railroad would be endangered by building a dam so high as to flood the track; and that a dam would soften the banks and possibly injure the road in that way; but that if the fills should be rip-rapped, witness thinks it would be safe, though the fact might develop otherwise.

Taking up now the testimony of the engineers for the defendant, we find that Mr. Boschke, at page 341, admits that a part of the line above the damsite would be flooded if a dam were built at that point, 60 feet in height; but, notwithstanding this, Mr. Boschke declares his opinion to be (pp. 341-342) that a dam might be constructed at the damsite 60 feet in height, and the railroad still be safely maintained, by *rip-rapping; and by building a retaining wall opposite that part of the railroad at and for a few hundred feet south of the demsite to keep out the water.*

On page 339, Mr. Boschke says:

> "I think a dam readily could be built there 60 feet or over, without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.

Q. Why weren't you building your road so as to guard against flood waters?

A. As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't today. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, *except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

On page 341, he states that some of the fills run down below the grade line five, ten, fifteen to *twenty-five feet on the center line and possibly more out on the slope.*

The meaning of the word "roadbed" has been before the courts in several cases.

The term roadbed is of plain import. It signifies the bed or foundation upon which rests the superstructure of rails and sleepers.

Santa Clara Co. v. S. P. R., 118 U. S. 413.
S. F. & N. P. R. Co. v. State Board, 60 Cal. 34.
S. F. R. Co. v. Stockton, 149 Cal. 90.

In re Belvidere Del. R. c. 75 N. J. Law 386.

In State v. Hannibal & St. Joe R. Co., 135 Mo. 637, the term "roadbed" is construed to mean, as used in a taxing act there under consideration, not merely on

foundation upon which the superstructure of ties, rails, and so forth, rests, but to include also the roadway or right of way.

The roadbed includes all that is necessary to support the superstructure.

> Osgood v. U. S. Health & Ac. Ins. Co., 76 N. H. 475; 84 A. 51, Ann. Cas. 1913 C. 425.

In McClure v. Great Western Association, 133 Iowa, 224; 110 N. W. 466, 8 L. R. A. N. S. 970, 119 A. S. R. 598, 12 Ann Cas. 41, the court says:

> "We quite agree that the term 'roadbed' does not of necessity include the entire right of way. From the standpoint of engineering it is the bed or foundation on which the superstructure of ties and rails is made to rest. This is the definition common to all the authorities. Webster's Inter. Dictionary; Century Dictionary; 7 Words & Phrases 6255. If, now, the superstructure be placed upon the natural surface of the ground, or perhaps at the bottom of a cut, it would seem reasonable to say that in strictness the roadbed extended no further outward than the respective lines marked by the ends of the ties. If, on the other hand, the superstructure is placed on a grade, or raised surface, it seems clear that the term must be held to include all portions of the superstructure, from base line to base line, or, at least, so far as designed to serve the purpose in view. This must be so because the term nat-

> urally implies a condition not of undisturbed nature, but resulting from the constructive work of human hands guided by a specific purpose. * * *
>
> Now, as constructed, an embankment forming a roadbed may in fact extend to the limits of the right of way, or it may happen that the ties and rails are laid at the bottom of a cut or on the natural surface of the ground simply made smooth for that purpose."

Defendant's engineer Owre testifies at page 408, that there are quite a number of fills along the road there, from the damsite to the head of the pondage that would be caused by a sixty-foot dam, but that the fills are not very deep at that point, with the exception of one or two, and that from the damsite north, and for a distance of possibly 500 feet going south, the railroad's fills or embankments extend down on to the roadbed of the old Shaniko Road; that the wagon road north of the damsite was largely built up with loose rock, and that south of the damsite, it was largely of earth construction.

On direct examination, defendant's engineer Brandon, who is not a hydraulic engineer (p. 421), testified on this point, as follows:

> "Q. Is the present location and elevation of the Deschutes Railroad at the so-called damsite such as will permit, as a practical engineering matter, of the construction, maintenance and use of a power dam in the Deschutes River, to an elevation of 60 feet above low water in the river?

A. Yes. There will be about 4½ feet leeway between such an elevation and the sub-grade of our line. This difference will increase about 1¼ feet between that point and a point 200 or 300 feet above the dam site.

Q. Will that distance, in your opinion, be sufficient, or is it practical, to take care of the flood waters of the Deschutes River within that difference?

A. *I can only say I think so,* for the reason that I did not make any surveys to determine how much area would be required at the top of the dam there for that, and it is necessary to obtain slopes, to take care of abruptness, and everything else."

Defendant's engineer Brandon says on cross-examination (p. 427) that the railroad, over a portion of the distance involved, is built on embankments; that a good deal of the material is loose rock mixed with volcanic ash soil, which character of soil does not possess firmness under the action of water, unless it is very well protected; *and that it is not protected now in any way.*

The foregoing extracts from the testimony make it clear, that by the decree the plaintiff is practically *enjoined from making any use of its power site.* Plaintiff has no right to rip-rap the railroad embankments, nor to undertake the reconstruction of any portion not safely built to withstand submersion; nor ought plaintiff to be under the least obligation to do these things. Yet it

appears that within the area to be submerged, there are fills of soft and easily disintegrated material, running down as much as 25 feet on the center line, and necessarily much further on the outer slope, which would be imperilled by flooding, at least unless rip-rapped and properly taken care of. Yet plaintiff is enjoined by the decree from building any dam or doing anything on the premises which will flood or damage defendant's roadbed or interfere with the railroad company's "slopes and safe supports therefor," without any obligation being imposed on the railroad company to do anything more than it has already done to protect itself. Our contention is that the railroad company, having agreed to build so as to permit the construction of a 60-foot dam, ought to be compelled to take all necessary measures to protect its own roadway in case such a dam is built and assume the risk involved; and that the plaintiff ought to be decreed the affirmative right to construct a dam to such a height, without liability to the railroad company for anything that happens because thereof. As to whether or not a 60-foot dam could be built at all without imperilling the railroad, even with proper precautions on the railroad company's part, there is some difference of opinion among the engineers. It is probably not necessary to review that testimony fully. Some of it appears in the extracts we have quoted above. It may fairly be said that the engineer witnesses for the plaintiff, who are men of such eminence in their profession that their opinions are entitled to great weight, agree that there is an element of risk of damage to the railroad, which is a very material factor in depreciating the value of the power site, if the plaintiff company is to assume that

risk. We call attention to the testimony of the different witnesses: Thompson (p. 252), Dillman (p. 277), Kyle (p. 294), and Richardson (p. 596).

On the other hand, the engineer witnesses for the defendant expressed the opinion, as appears in the extracts we have given above and in other places, that a dam 60 feet high can be built and the railroad can still safely be maintained by rip-rapping and by constructing a retaining wall opposite that part of the railroad tracks near the damsite and for a few hundred feet south, and provided special means are adopted to take care of the flood waters. See the testimony of Boschke (p. 342); Brandon (pp. 422-426).

An exceedingly important point which must not be overlooked is, that the defendant's engineer witnesses concede that if a 60-foot dam is built, it will be necessary to install some special means of taking care of the flood waters. The defendant's chief engineer, Boschke, says (p. 339):

> "I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, *if the flood waters were properly taken care of.*"

Defendant's engineer Brandon admits, at p. 426, that such a flooding of the railroad as would occur by the construction of a 60-foot dam would be highly dangerous. Defendant's engineer Wickersham testifies, at p. 429, that it would be necessary to provide some method of taking care of the flood waters; and on cross-examination this witness testifies (p. 443):

"A. Now, as I understand you, it would be necessary to provide some way of taking care of that water, if a 60-foot dam were to be installed at that point?

A. Yes, sir.

Q. It is not practicable, then, to build the 60-foot dam at the point in controversy, as that railroad now stands, without providing some special method of taking care of flood waters, is it?

A. Flood waters should be taken care of.

Q. They will have to be taken care of by some special method or else a 60-foot dam cannot be built?

A. Yes, sir."

Defendant's engineer witness Kelly testifies (pp. 458, et seq.) that a 60-foot dam could be built without interfering with the defendant's railroad "with a properly designed spillway, that is, a spillway that would take care of the flood flow." This witness then promulgated his siphon plan of spillway.

The expedient of flash boards was also suggested by the defendant. We think little attention need be given to that suggestion, in view of the unanimity with which the engineers on whose advice the plaintiff must rely have condemned it; the evident fact that they are a device for increasing low-water head, and not for control of high water flow; the failure of the defendant to show that they are ever used for controlling flood waters, or

on such a large scale as would here be necessary, and the evident risk and expense involved.

The plans prepared by J. G. White & Company contemplate an open 450-foot spillway or weir, of substantially the length of the dam, by which the flood-waters would pass over the top of the dam; which is the ordinary method. It is undisputed in this case, that in engineering parlance a 60-foot dam means a dam with masonry crest 60 feet above low water. Engineers Thompson and Whistler so testify, and we believe there is no contradiction.

We submit that in all fairness, if the railroad company has not built its line (as admittedly it has not) so as to allow room for the flood waters safely to pass when a 60-foot dam of the ordinary type is built, then the decree ought to provide that when a dam is built, the railroad company shall either make its line safe by raising it and doing whatever else is necessary; or otherwise the railroad company should bear the expense that may be necessary to install any special form of siphon or other unusual type of spillway, and should take any risk of its failure to operate with safety.

REVIEW OF RESPONDENT'S BRIEF.

I.

The first division of respondent's brief is devoted to the proposition that the relief sought by the plaintiff cannot be granted, by reason of the failure of the land company to object to the construction of the railroad over

the Sherar land, when it learned that said road was being so constructed. When this portion of the argument is examined, it is found to mean that the plaintiff cannot now have an injunction preventing the railroad company from maintaining or operating its railroad over and across the plaintiff's lands. This we consider irrelevant to the case as it now stands. The lower court having allowed the railroad to be completed pending the litigation, denied an injunction, which course may have been within its discretion. It is, however, well established that where the Court refuses an injunction, it may hold jurisdiction for the purpose of awarding other adequate relief, and, in a proper case, it is the duty of the court to do so.

Cowan v. So. Ry. Co., 118 Ala. 554, 23 So. 754.

New York v. Pine, 185 U. S. 93, 22 S. Ct. 592.

Duncan v. Nassau El. Ry. Co., 111 N. Y. S. 210.

Calway v. Met. El. R. Co., 128 N. Y. 132, 28 N. E. 479.

Papponheim v. Met. El. R. R. Co., 128 N. Y. 436, 28 N. E. 518.

Shepard v. Manhattan R. Co., 117 N. Y. 422, 23 N. E. 30.

Lynch v. Met. Ry. Co., 129 N. Y. 274, 29 N. E. 315.

Bohm v. Met. Ry. Co., 129 N. Y. 576, 29 N. E. 802.

Kernochan v. Manhattan Ry. Co., 161 N. Y. 339, 55 N. E. 906.

Knoth v. Met. R. Co., 187 N. Y. 243.

Lucas v. Ashland Light M. & P. Co., 138 N. W. 761 (Neb.).

O. R. & N. Co. v. McDonald, 58 Ore. 236, 112 Pac. 413, 32 L. R. A. (New Series) 117.

The case last cited was carried to the United States Supreme Court and affirmed.

McDonald v. O. R. & N. Co., 34 Supreme Court Rep. 772, 233 U. S. 665.

II.

The second division of respondent's brief is devoted to the argument of the proposition that the Land Company did not acquire the property under representations that it had a right to construct a dam 60 feet high. If this be true, defendant is a trespasser, and the testimony of the defendant's witnesses must be disregarded. We do not understand this to be a vital issue in the case. Our contention is that the Railroad Company entered on the land with the understanding with plaintiff's predecessors in interest that it would protect the hydraulic possibilities of the site, at least to the extent of the right and opportunity to erect a sixty foot dam. The evidence to this effect is so overwhelming, that it is not disputed that the Railroad Company had agreed with plaintiff's predecessors in interest so to locate its road as to permit the construction of a sixty-foot dam. This point is argued fully in the opening brief of the appel-

lant, and it is not necessary to discuss it at length here. Briefly stated, the two points are:

> "(a) Did the Railroad Company enter on the land with the understanding between itself and plaintiff's predecessors that it should build so as not to interfere with the hydraulic possibilities of the site?
>
> (b) If so, how far did it agree to go in the protection of the dam and flowage right?"

We say that the plain answer to the first question is yes, and that the Railroad Company agreed to protect the site to the extent of permitting a 60-foot dam to be built. Laughlin (pp. 518-519); Welch (p. 234); Huntington (p. 174 and Huntington's letter, Plaintiff's Exhibit 29, and p. 175); Grimes (pp. 547-548); all testify that their proposal in response to the request of the Railroad Company for leave to build across the land was, that the Railroad Company might do so, provided it would protect the water power. The testimony of defendant's witnesses shows that in response to this proposal and requirement that the Railroad Company must protect the water power in case it was given leave to build, the Railroad Company agreed to protect the water power to the extent of permitting a 60-foot dam to be built, and that defendant entered on the land with that understanding. See the testimony of Morrow (pp. 360-368), and of Boschke (pp. 334-336).

Here is no conflict of testimony, but plain harmony. The Railroad Company, having got into possession on such an understanding, says now that it will protect no

hydraulic possibilities at all, and will permit no dam to be built that softens any of its slopes or floods any of the margins of its right of way.

III.

The third division of respondent's brief is devoted to the argument that the Interior Development Company owned the only water appropriation on the river; and, inasmuch as it is alleged that the president of that company acquiesced in the construction of the road at the height where it was built, on the understanding that he could erect a 60-foot dam, therefore the plaintiff, as present owner of this water right, cannot question the decree that was entered in this case.

Notwithstanding this alleged agreement with Mr. Welch that he should be protected in the opportunity to build a 60-foot dam, we find nothing in the decree to grant his successor in interest such a right; but, on the contrary, it is argued here that no dam to exceed 28 feet in height can be built without infringing on the railroad. The agreement testified to by Mr. Welch was that if the Railroad Company would protect the filing of the Development Company allowing for a 60-foot dam, the Development Company would be satisfied. The Railroad Company claims it built under that agreement. Yet it claims the right, and it may have the right under the decree that has been entered in this case, to say that neither Mr. Welch nor his successor has any privilege to go above 28 feet. It even contends that the building of any dam at all, if it can be shown that such construction would interfere with the

operation of the railroad, or flood its roadbed, is not permissible.

Mr. Welch appears as a very willing witness in favor of the Railroad Company, and was ready to answer "yes" to everything the Railroad Company could suggest in its own favor. He testifies that some time in September, 1909, he saw Mr. Boschke and told him of the desire of the Development Company to be protected for the construction of a 60-foot dam; and that Mr. Boschke showed him a map which indicated a level of 64 or 65 feet above low water for the railroad. It is manifestly out of the question that Mr. Boschke should have shown him a map indicating such a level; for the Railroad Company did not have a survey indicating the level until the next April, some seven months later. It was subsequent to this interview that Boschke told Whistler the elevation was about 70 feet; and, admittedlly, none of the profiles of the Railroad Company showed the height above water level.

Going back now to the main point of defendant's contention, that because the water appropriation belonged to the Interior Department Company, our project is bound by Mr. Welch's statement, there are two answers. Until the purchase of the Interior Development Company stock and land holdings, the owners of the Sherar project, which was the main project, owning nearly all of the land and controlling the whole situation, was contented, and still is contented, to rely on its water rights as riparian owner. The Deschutes is not a navigable stream. The plaintiff company owns the

land on both sides of the river, including its bed, at the falls and for several miles above and also for a long distance below, including the power house site. It does not need to divert the water from its own land; but merely to make use of the same on its own land and to return it undiminished to the stream. This it may do as owner.

> Donnelly v. U. S., 37 Sup. Ct. Rep. 456.
> Fulton Light, Heat & Power Co., et al., v. State of New York, 37 L. R. A. (N. S.) 308.

The lower court concurred in this view.

There is no merit in the claim that the Eastern Oregon Land Company lost its right to demand performance of the agreement entered into by its predecessors in interest and the railroad company, merely because it acquired the stock and the property of the Interior Development Company. It may be conceded, for the purpose of argument, that the Interior Development Company is estopped from questioning the location of the road in the place where the same has been built, though this estoppel must be based on the testimony of Welch, and the admitted facts are quite conclusive that Welch was incorrect in his account of the transaction that took place. But, even though the Interior Development Company could not itself have asserted the rights which plaintiff asserts, clearly the plaintiff did not lose other rights which it had under contract, merely because it purchased property of a third person who could not assert similar rights. Giving full force and effect to the estoppel claimed against

the Development Company, it cannot be made to extend to the Land Company, claiming in a right other and different from that of the Development Company's right, merely because the Land Company subsequently acquired the property of the Development Company. In such instance, an estoppel may run with the property, and to the extent of the particular property, but no further.

In the last place, so far as this point is concerned, if the plaintiff, as successor of the Sherar interests, and under the agreement made with those interests, pursuant to which the defendant entered on the land, has the right to construct a 60-foot dam, what difference does it make that the plaintiff might not have acquired the right to construct more than a 55-foot dam, for instance, if this right depended solely on what it got from the Interior Development Company? Under the agreement as to the Sherar lands, the defendant has no right to limit the dam to a height less than 60 feet.

IV.

Part IV of defendant's brief is devoted to what we consider the main question of the case, argued at full length in our original brief; which is the question as to which of the parties is estopped by what transpired. Our contention is that the defendant, by its agreement with the plaintiff's predecessors in interest, is bound by contract to permit and to provide for the construction of a 60-foot dam; while defendant's contention is, that the mere knowledge that the defendant was building its road over the lands, and the mere opportunity to deter-

mine by a survey whether it was keeping its agreement as to the protection of the right to build a 60-foot dam, act as an estoppel against the plaintiff, and amount to a complete waiver of the right to construct a 60-foot dam. That point we do not desire to re-argue here, but refer the court to the discussion in the original brief.

V.

The fifth section of respondent's brief is devoted to the argument that the compensation given by the lower court is ample, for the reason that the plaintiff is not now possessed of all the land requisite to the development of a power project by the construction of a 60-foot dam. The basis of this contention is, that there are said to be lands in private ownership and lands in the ownership of the Railroad Company, which would be flooded by any dam exceeding 28 feet. The argument might be put in this way:

Here is one of the best water-power sites in this part of the world—a power site capable of sustaining the industries of a city. Here is a plaintiff company which has acquired the falls, the damsite, the power house site, the banks and bed of the stream for a distance of some three and one-half miles, and the flowage rights from the railroad company located on the west bank of the stream. But here is the defendant Railroad Company, which has entered on the lands under an agreement with plaintiff's predecessors that, if allowed to enter, it will protect the power possibilities of the site, at least to the extent of what can be developed with a 60-foot

dam. Having thus entered and built its railroad, this defendant company now says the plaintiff cannot enter at all and build a 60-foot dam or any other dam exceeding 28 feet in height, because by doing so, some of defendant's land will be flooded. It is not contended that such a dam would injure the railroad, but merely that it would be a technical invasion of its right, by flooding the margin of its right of way. Therefore, it is contended this power project is worthless, and no substantial damages should be allowed for interference therewith. We do not believe such a contention on the part of the defendant company will receive any consideration in a court of equity.

This contention of the defendant rests on the authority of certain cases, said to hold that where a plaintiff has not acquired all the land essential to its use of the property in the most advantageous way, the possibility of its devotion to that most advantageous purpose cannot be taken into consideration. Such, we submit, is not the purport of these cases. We understand them to hold, that where the plaintiff has not acquired a complete project and there is no reasonable probability that the plaintiff ever can do so, the possible use of the property for such advantageous purposes is not to be taken into consideration. But the cases the defendant cites treat of instances where the possibility of acquiring what is lacking is so remote and speculative that it cannot be taken into consideration. We submit that this is no such case. Here almost a complete project has been assembled—properties have been acquired constituting all the main fea-

tures of the project, and the lacking area is very small. Moreover, the plaintiff corporation is by the law given the power of eminent domain for the acquisition of what additional lands it may need.

Lord's Oregon Laws, §6553.

Grand Ronde Electrical Co. v. Drake, 46 Ore. 243.

Walker v. Shasta Power Co., 160 Fed. 856, 19 L. R. A. (N. S.) 725.

Henderson v. Lexington, 22 L. R. A. (N. S.) 136.

Even as against the defendant corporation, this power of eminent domain exists so long as it is not destructive of the public use to which the defendant is devoting its property. There is no contention and no evidence that the mere flooding of the margin of defendant's right of way along the river to the extent it would be flooded, three and one-half miles above the damsite, and more, would be thus destructive. This right of condemnation as against the defendant is abundantly sustained by the authorities.

Lewis' Eminent Domain (3rd Ed.), §§411-440.

15 Cyc. 612, et seq.

In re Certain Land in Lawrence, 119 Fed. 453.

P. & W. V. R. R. Co. v. Portland, 14 Ore. 188, 12, P. 265, 58 Am. Rep. 299.

State ex rel. Skamania Boom Co. v. Superior Court Skamania Co. et al., 47 Wash. 156, 91 P. 637.

Ore. Short Line Co. v. Postal Tel. Cable Co. of Idaho, 111 Fed. 842.

It is very evident from the language used by the courts that where almost a complete project is assembled, and particularly where the remainder can be readily acquired by condemnation, it will not be held that the part already assembled has no value for the contemplated purpose, because it is not complete. We call attention to the language of the court on this point in the case of *McGovern v. City of New York,* cited by respondent. That was a case of one of hundreds of different owners, and the court considered the chance of his ever acquiring a complete reservoir site too remote and speculative for consideration, and says he could not add to the value of his holding "by the hypothetical possibility of a change, *unless that possibility was considerable enough to be a practical consideration and actually to influence prices.*" What the court then says about excluding the power of eminent domain, is evidently meant to apply only to cases where no power of eminent domain exists, and where the plaintiff's holdings are such a small fraction as to possess alone no substantial value for the intended purpose.

In the later case of *New York v. Sage,* 239 U. S. 57, decided November 8, 1915, the court says:

> "The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have con-

> sidered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price."

It is clear that the rule for which defendant contends has no application to a project 90% complete; nor to one where the power of eminent domain is possessed. Defendant's contention proves too much. If it were the law, then the owner of all the main elements of a great water power project, running into the hundreds of thousands of dollars in value, like the one here, who might lack a little fraction of the lands necessary to complete his project, could not recover any damages against a railroad company which entered on his land and built in such a manner as to spoil his project, for the simple reason that it was not absolutely complete. By this reasoning, the right of way of a railroad 100 miles in length would have no value in court, if it still lacked one mile of right of way to get to a profitable terminus.

This question of our alleged lack of the right to flood some of the margin of defendant's right of way two and one-half miles and more above our dam by the backwater of a 60-foot dam, is one we say the defendant has no right to raise against us. The condition of building its road was that we should be allowed to build

a 60-foot dam. If in doing so, we flood some of defendant's right of way, we have a right to do so, and the decree should so provide. For defendant to stipulate that we may build a 60-foot dam, and then say that in doing so we must not flood any of its lands above 28 feet in height, would be a plain fraud.

VI.

The sixth division of respondent's brief embodies the contention that the claim for damages in this case, if any exists, belongs to the predecessors in interest of the Land Company. This contention overlooks the fact that by the terms of the agreement with the representatives of these predecessors in interest, under which the defendant entered on the lands, it was stipulated that if a sale was made under the option which plaintiff then held, the defendant must settle with the plaintiff for damages arising out of the appropriation of the land. On this point, plaintiff calls the court's attention to an extract from the testimony of Mr. Morrow, right of way agent for the defendant company, respecting his conversation with Mr. Grimes, one of the executors of the Sherar estate, and Mr. Huntington, attorney for the executors, in August, 1909, as follows: (Tr., p. 346.)

> "At that time there was an understanding had—that is, I was led to believe, in fact, I was told that some parties had an option on the property, and an understanding was had that in case the sale was made, then I should have to deal, or I must deal with the purchaser."

Attention is also called to the following sentence contained in the letter of Huntington to Morrow, dated August 25, 1909 (Pl. Ex. 29):

> "If the sale is made, as we assume it will be, then you *are to settle with the purchasers for the right of way.*"

That this conversation and letter had reference to the then pending sale of the lands to the plaintiff corporation is admitted by all the parties.

Under these circumstances, not only has there been an equitable assignment of any claim for damages accruing prior to the exercise of the option, but the defendant has expressly agreed to respond to such damages and to pay them to the plaintiff as part of the contract under which it entered.

Apart from the rights created under this agreement, the right of action arose and is vested in the plaintiff.

Plaintiff held an option to purchase this property at the time the entry took place, and this option carried with it an immediate right of possession. (See Plaintiff's Exhibit 24, Tr. p. 629, at p. 632.) Such an option creates an equitable interest or estate in land, vesting, as it does, in the person who holds it, the right to call for a conveyance of the property. Once the option is exercised, the person holding it becomes vested with the full, equitable title to the property. Until the option is exercised, his equitable interest or estate exists, but is contingent.

Mr. Justice Jessell, Master of the Rolls, decided, in the case of *London & Southwestern Ry. Co. v. Gomm,* (20 Chan. Div. 562, at 579), that an option such as this creates an interest in the land which it covers, from its inception. The question arose in that case in connection with the rule against perpetuities. The Master of the Rolls said:

> "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.
>
> "It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period."

In the same case, Sir James Hannen said (p. 586):

> "The next question is, does this covenant create an interest or estate in the property at law, or in equity * * * I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from *Sanders,* 'a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined.' Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option."

The Supreme Court of Oregon, in the case of *House v. Jackson, et al,* 32 Pac. (Or.) 1027, at 1029, held that an option created an equitable estate, the court saying:

> "The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed, and when an agreement has been made for the sale of lands

> the vendor is deemed the trustee of the purchaser of the estate sold; and the purchaser, trustee of the purchase money for the vendor. *The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. Haley had an estate in the premises, and was equitably the owner thereof.*"

In Barton v. Thaw, 92 Atl. (Penn.) 312, the court said:

> "The option to purchase land constituted a substantial interest in the land."

See also:

> Windsor v. Mills, 157 Mass, 362.
> Woodall v. Clifton (1905), 2 Ch. Div. 259.
> Worthington Corp. v. Heather (1906), 2 Ch. Div. 538.
> Starcher v. Duty, 56 S. E. (W. Va.), 524, at 526.
> Telford v. Frost, 44 N. W. (Wis.) 835.

That the trespass complained of constitutes injury to the interest of the plaintiff existing at the time it took place, is self-evident, and that the holder of such an equitable interest may, after full, legal title has been vested in him, recover to the full extent of the trespass committed, is well settled by authority.

In a leading case in Massachusetts, *Pinkerton v. Boston & Albany R. R. Co.,* 109 Mass. 527, at 537, Ames, J., said:

"With regard to any previous taking of the land, the respondents deny the petitioner's right to recover damages, on the ground that the legal title had not vested in him at the time. But before the filing of the location of 1866, he had made a contract for the purchase of the land, and had thereby become equitably entitled to a conveyance upon the performance of the conditions of the purchase. The price which he had agreed to pay was made up on the assumption that he was to become the owner of the entire lot, unincumbered by the action of the respondents in appropriating a portion of it to their own use. Under the decree of this court, he has been compelled to fulfill his contract, and to pay the price of the entire lot. The effect of this decree is that he gets from his grantors less than he contracted for, and that all the damage resulting from the construction of the respondents' railroad falls upon him, and not upon the parties from whom he derived his title. So far as it is a question between him and his grantors, there can be no doubt that the compensation for the taking equitably belongs to him, and not to them. If it should be paid to them, the result would be that they would be paid a second time, for what they have already sold and been paid for. They have already been paid for the entire lot, and if in addition to the price paid them they were to proceed and recover damages for land, taken after they had ceased to have the equitable title, they would be liable for any

amount so recovered to the petitioner, as his trustees. It is a mere question whether he can claim the damages in his own name, or is bound to sue for them in the name of the grantors, in whom the legal title stood. *We do not think that, in proceedings of this nature, there is any inflexible rule of law that requires the court to shut its eyes to the real interests of the parties, or to refuse to take into consideration their substantial rights and equities in relation to each other. All that the respondents are entitled to is that they shall not, after paying the damages to one party, continue liable to pay them to another. If we hold that the effect of the decree, for the purpose of this trial, is to carry the petitioner's title back to the date of the deed (which the court has held was properly tendered and should have been accepted)*, exact justice will be done, and the respondents will be protected by the judgment. In *Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co.*, 10 Cush. 385, *it was decided that the owners of equitable or contingent interests might properly join with the owner of the fee in the application for damages, 'and that as they would all be bound by the judgment in such case, it operates as a security to the respondents, and cannot affect them injuriously, although such petitioners are not, in a strict sense, joint owners or proprietors of the land.'*

"For these reasons, we must hold that the petitioner is also entitled to damages for the land taken in 1866, according to its value at that time."

So, also, in *Odell v. Gulf C. & S. F. Ry. Co.*, 22 S. W. (Tex.), 821, it was held that a vendee under an executory contract for the sale of land which is taken in condemnation proceedings, is entitled to compensation for his interest therein, even though he be in default, the court saying:

> "It also appears that, while the damage was done before the time specified in the obligation for the first payment to be made had arrived, he had not at the institution of this suit, which was after that time, made any payment, as provided in said instrument; but no advantage seems to have been taken by Crane and Ramsey of this default, and it seems that they were still willing to execute a deed, as therein provided, upon his complying with the terms of the instrument. Appellant was not made a party to the condemnation proceedings, but met the commissioners appointed to assess the damages, and informed them of his interest in the land, and that he claimed damages. We are of opinion that there was error in instructing the jury, under this state of fact, to return a verdict against appellant. In treating of the subject of parties to condemnation proceedings, Mr. Lewis, in his work on Eminent Domain (section 319), lays down this rule: 'In case of an executory contract of sale it is generally held that the vendee is entitled to the compensation on the ground that he is the equitable owner of the property, and that what is taken is subtracted from what he is to recover by his contract, while the

> vendor remains entitled to the whole amount of purchase money agreed to be paid. The better course, however, would seem to be to make both the vendor and vendee parties, and then the compensation can be paid to the one or the other, or apportioned between them, as may seem just to the court.' The following authorities cited in the note have been examined, and seem to sustain the text: *Railway Co.* v. *Wilder,* 17 Kan. 239; *Kuhn* v. *Freeman,* 15 Kan. 423, 426; *Railroad Co.* v. *Ingalls,* 15 Neb. 123, 16 N. W. Rep. 762; *Pinkerton* v. *Railway Co.,* 109 Mass. 527; also, *Proprietors of Locks & Canals* v. *Nashua & L. R. Co.,* 10 Cush. 385."

See also:

Clark v. *Long Island Realty Co.,* 110 N. Y. S. 697.

Fulton County v. *Amorous,* 16 S. E. (Ga.) 201, at 202.

Nixon v. Marr, 190 Fed. 913.

After the option is exercised, the rights of the plaintiff under the option relate back to the date of the agreement, and are, in point of time, prior to the date when the defendant entered on the land. We quote from 3 *Pomeroy Eq. Jr.* (3 Ed.) 1163:

> *"Time of equitable conversion in contracts of sale with option.* In contracts of sale upon the purchaser's option, the question of whether or not a conversion is effected at all cannot, of

> course, be determined until the purchaser exercises his option; but the moment when he *does* exercise it the conversion as between the parties claiming title under the vendor *relates back* to the time of the execution of the contract. Thus, where a lessee with an option to purchase—or any other purchaser with an option—duly declears his option after the death of the lessor or vendor who is the owner in fee, the realty is thereby converted *retrospectively* as between those claiming under the lessor or vendor, or under his will."

The leading decision on this point is *Lawes v. Bennett,* 29 Eng. Reprint 1111, rendered by Lord Kenyon. The syllabus of the case, which states accurately the facts and the law as decided therein, is as follows:

> "A makes a lease to B for seven years, and on the lease is endorsed an agrement that if B shall within a limtied time be minded to purchase the inheritance of the premises for 3000 pounds A would convey to him for that sum. A dies and by his will gives all his real estate (generally) to D and all his personal estate to E and D equally. Within the limited time, but after the death of A, B's assignee claims the benefit of the agreement from D, who accordingly conveys the premises to him. Held that the sum of 3000 pounds when paid is part of the personal estate of A and that E is entitled to one moiety of it as such."

Lord Kenyon says, in the court of his opinion:

> "When the party who has the privilege of making the election has elected, the whole is referred back to the original agreement."

This case has been followed in *Townley v. Bedwell,* 14 Ves. Jr., 591, and numerous English cases; also in several decisions in this country. *Kerr v. Day,* 14 Pa. St., 115; *Holland v. Cruft,* 26 Pa. St., 169; *Keep v. Miller,* 42 N. J. Eq., 107.

It seems to have been approved by Mr. Justice Wolverton, who wrote the opinion in the case of *Clarno v. Grayson,* 30 Ore. 125, where in discussing an option, Judge Wolverton says:

> "It is said that when the option has been declared it takes effect as an equitable conversion by relation back to the date of the original contract: *Kerr v. Day,* 14 Pa. St. 112 (53 Am. Dec., 526); *Ripley v. Waterworth,* 7 Ves., 436; 3 *Pomeroy Equity Jurisprudence,* Sec. 1163."

See also on the same point, *Estes v. Furlong,* 59 Ill. 298; *Peoples Street Ry. Co. v. Spencer* (Pa.), 36 Am. St. Rep. 22; *Frick's Appeal,* 101 Pa. St. Rep. 485.

While the rule of relation is not of universal application, it is a proper rule to apply it so far as the right to recover damages from a tort feazor is concerned. Were it otherwise, property subject to an option might be trespassed upon at will and no recovery could be had if the option were exercised, as under such circumstances

the owner of the property would have suffered no damages, having received the full price which he had contracted to take, and the holder of the option would, under the rule invoked by our opponents, be unable to recover damages from the trespasser.

It is also to be borne in mind that the Sherar heirs conveyed the said lands to the plaintiff by warranty deeds, and if the lands, at the time of their conveyance, were subject to an easement in favor of the railroad company, the same constituted a breach of the covenant of warranty. To avoid circuity of action, equity would treat the warranty as an assignment to the plaintiff of any right of action against the Railroad Company which may have existed in favor of the Sherar heirs.

By its prayer for relief herein the defendant has, in its answer to the second amended complaint, submitted to the court the question of the amount of damages arising by the taking of the said lands, and has prayed the court to determine the damages and to decree to the defendant a title to its right of way upon the payment of such damages.

But the primary redress for which plaintiff is contending is not that of damages for the ruining of the water power project, but for a decree that shall protect us in the right to construct our project with a 60-foot dam.

VII.

In the seventh division of the Railroad Company's brief (p. 91), the contention is made that because of the withdrawals which had taken place pending the Sherar selections, the right of way meantime granted to the Railroad Company acquired priority and became paramount to the said Sherar selections.

The court below had held that said grant of a right of way acquired priority because of the doctrine enunciated in the case of *Daniels v. Wagner,* since reversed. In view of this reversal, of course it becomes necessary for the Railroad Company to find a new ground to sustain the grant of the right of way.

The ingenious contention now made is, that by the said withdrawals, all existing entries were absolutely terminated; that the lands withdrawn constituted a reservoir site; and that the grant of the right of way to the Railroad Company took effect under the Act of March 3, 1899, 30 Stat. 1233; 7th Fed. Stat. Ann., 1099.

There are several serious faults in this theory. It is obvious that if the lands were not a reservoir site, then the grant of a right of way could not take effect under the Act of March 3, 1899. The contention that this narrow, precipitous canyon was ever intended by the Government to be a reservoir site, is an obvious absurdity; and is entirely lacking any support in the record. The Act of June 17, 1902, is not particularly a reservoir act, and there is not a hint in the record that the lands were withdrawn for a reservoir. The secretary did not undertake to cancel existing entries, as is self-evident from the

> ment, in dealing with the public lands, as equivalent to a patent issued, and when the patent does issue, it relates back to the inception of the right of the patentee."

When the case was considered in the Supreme Court, that Court used the following expressions touching the same point (190 U. S. 301; 23 S. Ct. R., 696):

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues, the legal title will vest from the time of selection."

It seems to us evident that the defendant cannot prevail on any such grounds. Our selections were never canceled, but passed to patent. The rights acquired thereunder relate back to the initiatory act, which antedates anything the defendant company did to acquire a right of way.

DEFENDANT'S CROSS-APPEAL AS TO COSTS.

The Railroad Company made no tender and no offer to pay compensation until after the litigation was begun. Its license from the Sherar estate provided that it must settle with the purchaser (plaintiff corporation) for the right of way, as well as preserve the hydraulic possibilities of the site. Such a license to enter as it claims to have had was no waiver of damages.

Lewis on Em. Domain (3rd Ed.) Sec. 889.

Payne v. Morgan S. S. Co., 43 La. Ann. 981; 10 So. 10.

Webster v. Kansas City R. R. Co., 116 Mo. 114; 22 S. W. 474.

Childs v. Kansas City R. Co., 117 Mo. 414; 23 S. W. 373.

Longworth v. Cincinnati, 48 Ohio St., 637; 29 N. W. 274.

Cowan v. So. Ry. Co., 118 Ala. 554; 23 So. 754.

San Antonio Ry. Co. v. Hunnicutt, 18 Tex. Civ. App. 310; 44 S. W. 535.

Castles Bros. v. City of New York, 137 N. Y. S. 734.

Beck v. Lewisville N. Ry. Co., 3 So. 252.

Moreover, the defendant company has throughout the litigation sought, and still seeks, to deprive the plaintiff of the rights plaintiff has under the stipulation pursuant to which defendant entered. We submit that this court ought not to disturb the ruling of the court below on the question of costs; but that the decree on the merits should be modified as contended for in our opening brief.

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